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Children Born of the Marriage- Res Judicata Effect on Later Support Proceedings

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RECENT CASES

"CHILDREN BORN OF THE MARRIAGE"– RES JUDICATA EFFECT ON LATER SUPPORT PROCEEDINGS

L__A__J__ v. C__T__J__[1]

In a divorce proceeding initiated by the wife (LAJ) in which the husband (CTJ) was served by publication, the petitioner alleged that there were three children "born of the marriage" and requested an award of custody. The husband failed to enter an appearance and, on May 9, 1972, the Circuit Court of Jackson County, Missouri, entered a decree awarding LAJ the divorce and custody of the three children. Neither child support nor alimony could be obtained since the trial court lacked personal jurisdiction over the husband. Five years later, the wife brought an action in the same court on an "Amended Motion for Order of Child Support." The husband, personally served in this action, defended by denying paternity of one of the three children. At the evidentiary hearing on the motion, an objection to cross-examination of the wife was sustained on the ground that the divorce decree's recital that the children were "born of the marriage" made the issue of paternity res judicata. The trial court made an award of child support, from which the defendant appealed on two points: abuse of discretion in the amount of the support award, and error in refusal to hear evidence on the issue of paternity.

The Missouri Court of Appeals, Western District, found an abuse of discretion in the amount of the support award, and reversed and remanded the case for the taking of further evidence on the issue of the husband's ability to pay.[2] The court concluded that, because on remand it was probable that the husband again would want to litigate the issue of paternity, it was necessary to decide the merits of his contention that the trial court erred in its refusal to allow him to raise non-paternity of one of the children as a defense. This point of error focused on whether the divorce decree's recital that the children were "born of the marriage" was res judicata as to their parentage.

1. 577 S.W.2d 151 (Mo. App., W.D. 1979).

2. *Id.* at 153-54. The trial court had awarded support totaling $7200 a year. The only evidence presented concerning the father's ability to pay was his income of $3600 from two years before and the fact he had an auto polishing business, with no evidence given as to the business's assets. Although this was a court-tried case, the judgment was reversed on the ground that it was against the weight of the evidence.

The divorce decree, based on constructive service, had been final for five years. Although the court recognized that Missouri has a strong interest in preserving the finality of judgments, the court also was faced with the axiom that service by publication cannot support a money judgment, which in this case would result from the support obligation attendant to a finding of paternity.[3] The court resolved this conflict in favor of the husband. It recognized first that the husband, who had been served only by publication in the divorce action, had no opportunity to litigate the issue of paternity. Thus, the court held that he was not bound by the recital in the divorce decree that the children were "born of the marriage" and that he could defend in the subsequent support hearing by denying the parentage of the child.[4]

The holding of this case raises interesting new considerations in the areas of the prosecution and defense of dissolution and support actions. The case adds a new dimension to the paternity area, an area that, in Missouri, unlike most other states,[5] is not governed by statute but only by

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3. The court wrote that it found itself faced with "a near irreconcilable clash of classic principles—the inviolability of final judgments from all save direct attack vis-a-vis the inviolability of individuals from judgments for the payment of money rendered on something as tenuous as service by publication." *Id.* at 152.

4. *Id.* at 156.

5. Missouri, Pennsylvania, South Carolina, and Virginia are the only states that have no statutory schemes for establishing paternity. The remaining 46 states all have paternity or filiation statutes which vary greatly in their provisions, especially as to who is authorized to bring the action and the period of time in which the action can be brought. Ten of the states have adopted the Uniform Parentage (or Paternity) Act. ALA. CODE tit. 27, § 12(1) (Supp. 1973); ALASKA STAT. §§ 11.35.050-.100 (Supp. 1979); ARIZ. REV. STAT. ANN. §§ 12-841 to -851 (1973); ARK. STAT. ANN. §§ 34-701 to -715 (1962); CAL. CIV. CODE §§ 7000-7018 (West Supp. 1979) (Uniform Parentage Act); COLO. REV. STAT. §§ 19-6-101 to -129 (1973) (Uniform Parentage Act); CONN. GEN. STAT. ANN. § 46b-160 (West Supp. 1979); DEL. CODE ANN. tit. 13, §§ 501-524 (Supp. 1978); FLA. STAT. ANN. § 742.011 (West Supp. 1979); GA. CODE ANN. § 74-202 (1973); HAW. REV. STAT. §§ 584-1 to -26 (1968) (Uniform Parentage Act); IDAHO CODE § 7-1101 (1969); ILL. ANN. STAT. ch. 106¾, §§ 51-60.1 (Smith-Hurd 1963); IND. CODE ANN. §§ 31-6-6.1-1 to -19 (Burns Supp. 1979); IOWA CODE §§ 675.7-.15 (1950); KAN. STAT. § 38-1101 (Supp. 1973); KY. REV. STAT. §§ 406.011-.180 (1970) (Uniform Act on Paternity); ME. REV. STAT. tit. 19, §§ 271-287 (1964) (Uniform Act on Paternity); MD. CODE ANN. art. 16, § 66A (1957); MASS. GEN. LAWS ANN. ch. 273, § 12 (West 1970); MICH. COMP. LAWS ANN. § 722.714 (1968); MINN. STAT. ANN. §§ 257.252-.30 (West 1971); MISS. CODE ANN. §§ 93-9-1 to -49 (1972) (Uniform Law on Paternity); MONT. REV. CODES ANN. §§ 61-301 to -334 (Supp. 1977) (Uniform Parentage Act); NEB. REV. STAT. §§ 13-101 to -116 (1943); NEV. REV. STAT. §§ 126.080-.290 (1957); N.H. REV. STAT. ANN. §§ 168-A:1 to :12 (Supp. 1973) (Uniform Act on Paternity); N.J. STAT. ANN. §§ 9:17-1 to -25 (West 1976); N.M. STAT. ANN. §§ 22-4-1 to -24 (1953); N.Y. JUD. LAW §§ 511-518 (McKinney 1975); N.C. GEN. STAT. §§ 49-14 to -17 (1976); N.D. CENT. CODE §§ 14-17-01 to -26 (Supp. 1977) (Uniform Parentage Act); OHIO REV. CODE ANN. §§ 3111.01-.17 (Page 1972); OKLA. STAT. ANN. tit. 10, §§ 71-85 (West 1971); OR. REV. STAT. §§ 109.125-.235 (1977); R.I. GEN. LAWS §§ 15-8-1 to -19 (1956); S.D. COMPILED LAWS ANN. §§ 25-8-8 to -43 (1976); TENN. CODE ANN. §§ 36-223 to -229 (1974); TEX. FAM. CODE ANN. tit. 2, §§ 13.01-.09 (Vernon Supp. 1980); UTAH CODE ANN. §§ 78-45a-1 to -17 (1953) (Uniform Act on Paternity); VT. STAT. ANN. tit. 15, § 331 (1974); WASH. REV. CODE ANN. §§ 26.26.010-.905 (Supp. 1978) (Uni-

the common law. *L__A__J__* establishes that in a dissolution action or in a declaratory judgment action brought to adjudicate paternity, personal jurisdiction over the defendant husband or putative father must be obtained. Without personal jurisdiction, the recital or finding of paternity may be attacked by the defendant father in a subsequent support proceeding.[6] This casenote will discuss situations in which parties to a dissolution or paternity action may or may not be bound by the paternity finding.

Paternity is a fact question. Its resolution establishes a biological relationship between father and child which in turn creates a legal relationship. As one commentator has stated, "biological relationship *is* the test that has been used . . . for the fixing of support and other familial obligations, and it is *biological* relationship that underlies and is traced by legal relationship."[7] The aspect of the legal relationship that the *L__A__J__* court focused upon was that of support. Because the establishment of a legal relationship leads to ensuing support obligations, the *L__A__J__* court concluded that the proceeding which establishes the biological relationship, paternity, must be based on personal jurisdiction.[8] The court found authority for this conclusion in *T.J.K. v. N.B.*[9] That

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form Parentage Act); W. VA. CODE §§ 48-7-1 to -4 (1966); WIS. STAT. ANN. §§ 52.21-.25 (West 1957); WYO. STAT. §§ 14-2-101 to -117 (1977). For a discussion of Missouri decisional law on paternity, see notes 39 & 40 and accompanying text *infra*.

6. The holding in *L__A__J__* does not affect the court's power to award custody of a child when there has been service only by publication. 577 S.W.2d at 155. A distinction must be made between the determination of the custody of a child as opposed to a determination of the paternity of a child.

Rights and duties of parties relative to a res can be determined in an action in which jurisdiction is obtained pursuant to service by publication. Custody of a child can be considered such a res, and parents' rights and duties as respect the custody of a child can be adjudicated in an action in which only constructive service is had. For the court to have in rem jurisdiction, it is necessary only that the child (or res) be domiciled within the state. *See* Sanders v. Sanders, 223 Mo. App. 834, 14 S.W.2d 458 (Spr. 1929), in which the husband, a resident of Missouri, returned to Missouri from Maryland and filed for divorce from his wife who continued to reside in Maryland with the children of the marriage. The trial court awarded custody to the father but this was reversed on appeal for lack of jurisdiction over the children.

The *L__A__J__* court cited with approval Beckmann v. Beckmann, 358 Mo. 1029, 218 S.W.2d 566 (En Banc 1949). The husband in *Beckmann* temporarily had left the state with the children of the marriage and was served by publication. The divorce decree awarded custody of the children and support to the mother. The court held that the custody portion of the decree could stand because the court of the state where the child legally resided had jurisdiction to determine custody. The *Beckmann* court also held that the support award could not stand because of lack of personal jurisdiction over the father. *See also* Struttmann v. Struttmann, 463 S.W.2d 600 (St. L. Mo. App. 1971) (court's statutory power to make custody and maintenance provisions is incidental to dissolving marital status). In *Struttmann,* both a divorce and custody were requested. Because the court denied the divorce, it had no power to award custody.

7. Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decision on Equal Protection and Paternity,* 36 U. CHI. L. REV. 338, 345 (1969).

8. 577 S.W.2d at 155.

9. 237 So. 2d 592 (Fla. Dist. Ct. App. 1970).

case involved a paternity action brought under the Florida bastardy statutes[10] in which the mother had filed suit to have the defendant, a nonresident of Florida, declared the father of her child. She had not asked for support in that action. Summary judgment for the mother was entered after the putative father, who had been served only by publication, failed to enter an appearance. On the defendant's appeal from that judgment, the court held that, in such an action, jurisdiction over the person of the putative father is essential because the sole purpose of a paternity proceeding brought under the statute in question is to furnish a basis for compelling support of the child.[11] The Missouri Court of Appeals drew an analogy between the paternity action in *T.J.K.* and the divorce proceeding in *L__A__J__*. It reasoned that if the question of custody was not considered, the only purpose for a recital in the divorce decree that the children were born of the marriage would be to compel the father to support the children once personal jurisdiction could be obtained.[12]

The common law early imposed on a father the duty to support his children born in wedlock.[13] There is a strong presumption that a child born during marriage is the product of that marriage.[14] The use of the words "children born of the marriage" or a similar phrase in a divorce decree is really a statement of the common law presumption of legitimacy, *i.e.,* that the husband is the father of any children born or conceived during the marriage relationship. This presumption, although described as very strong,[15] is rebuttable. During a divorce hearing based on personal

10. FLA. STAT. ANN. ch. 742 (West 1964).

11. 237 So. 2d at 595.

12. 577 S.W.2d at 155-56.

13. Viertel v. Viertel, 212 Mo. 562, 576, 111 S.W. 579, 582 (1908). *See generally* Hoyne, *Child Support in Missouri: The Father's Duty, The Child's Right and The Mother's Ability to Enforce,* 36 Mo. L. REV. 325 (1971). There is, in addition to the common law duty, a statutory duty to support one's children. Until 1968, this obligation of support applied only to fathers of legitimate children. *See* note 39 *infra.* The relevant statutes are RSMo §§ 452.150, .340, and 568.040 (1978). Section 452.340 reads in part: "[T]he court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable or necessary for his support . . . after considering all relevant factors including: (1) *The father's primary responsibility* for support of his child. . . ." (Emphasis added.) This provision was construed in Mueller v. Jones, 583 S.W.2d 222 (Mo. App., E.D. 1979), to provide that the primary responsibility for support of an illegitimate child lies with the natural father.

Under RSMo § 568.040 (1978), the father's obligation of support can be enforced in a criminal proceeding. If the action is brought to enforce the duty of support of an illegitimate child, the state must establish paternity as an element of its case. State v. Tschirner, 504 S.W.2d 302 (Mo. App., D.K.C. 1973); State v. Summers, 489 S.W.2d 225 (Mo. App., D. St. L. 1972).

14. Rasco v. Rasco, 447 S.W.2d 10, 16-18 (K.C. Mo. App. 1969); T. v. T., 447 S.W.2d 795 (St. L. Mo. App. 1969) (for presumption of legitimacy to exist, the child must have been born or conceived during the period of marriage).

15. J.M.L. v. C.L., 536 S.W.2d 944, 945 (Mo. App., D. St. L. 1976) ("strongest presumption known to law"); Rasco v. Rasco, 447 S.W.2d 10, 18 (K.C. Mo. App. 1969) ("strong presumption of legitimacy"); Bernheimer v. First Nat'l Bank, 359 Mo. 1119, 1133, 225 S.W.2d 745, 751 (En Banc 1949) ("strongest known to law").

jurisdiction, the wife in *Boudinier v. Boudinier*[16] objected to evidence to prove adultery because it also tended to dispute the legitimacy, or paternity, of the child. The appellate court held that the trial court erred in sustaining the objection because legitimacy of a child born or conceived during a marriage is rebuttable. The court also held that "clear and convincing" evidence is necessary to overcome the presumption of legitimacy.[17] This is true whether the paternity of a child born during a marriage is contested during the divorce proceeding or in a subsequent action.[18] Since the husband in *L__A__J__*, unlike the husband in *Boudinier,* did not have the opportunity to rebut the presumption in the original divorce action, he would be given the opportunity in the support hearing.[19] The *L__A__J__* court, however, cautioned that the fact the husband would be given that opportunity did not imply that the evidence introduced was sufficient to overcome the presumption.[20]

It is clear from the holding in *L__A__J__* that a husband who, because of constructive service, has not had an opportunity to contest paternity in a divorce action may do so in a subsequent action. Even a husband who has been personally served and who has appeared in the divorce proceeding, however, may not have had an opportunity to contest paternity because the child was born after the divorce. If there is no mention of the wife's pregnancy in the divorce decree, Missouri courts have allowed the husband to contest the paternity in a subsequent support action.

In an early case, *Laumeier v. Laumeier,*[21] the divorced husband brought a declaratory judgment action against his ex-wife. The divorce decree had been silent as to any childern born of the marriage. The husband asked that either the court declare him to be the father of the child born after the divorce and grant him custody, or that he be found not to be the father and that his ex-wife and her child be enjoined from any

16. 240 Mo. App. 278, 203 S.W.2d 89 (K.C. 1947).

17. *Id.* at 294-95, 203 S.W.2d at 98-99.

18. The types of evidence that have been introduced to rebut the presumption of legitimacy may be seen in S. v. S., 520 S.W.2d 652 (Mo. App., D.K.C. 1975) (evidence of husband's sterility was sufficient to overcome presumption of legitimacy); Rasco v. Rasco, 447 S.W.2d 10 (K.C. Mo. App. 1969) (evidence of blood tests that husband probably was not the father insufficient to overcome presumption of legitimacy). Generally, the courts seem reluctant to find the evidence sufficient to overcome the presumption of legitimacy, since the result is to bastardize the child whose paternity is in question. *But see In re* L, Part II, 499 S.W.2d 490 (Mo. En Banc 1973). In that case the Missouri Supreme Court held that the testimony of the husband and wife (plaintiffs) that the husband was not the father, although they were living together at the time of conception and had two other children, was sufficient to overcome the presumption of legitimacy and was indeed sufficient evidence to support the finding that the defendant was the father of the child in question. *Id.* at 493.

19. 577 S.W.2d at 156.

20. *Id.*

21. 308 Mo. 201, 271 S.W. 481 (En Banc 1925). *See also* State *ex rel.* Shoemaker v. Hall, 257 S.W. 1047 (Mo. En Banc 1923) (identical parties as *Laumeier;* wife contested by a writ of prohibition the court's jurisdiction over her).

further actions against him. In ruling that the declaratory judgment action was a proper means to test paternity under the circumstances, the court stated that if the wife "had filed a proceeding to modify the divorce decree, so as to provide for the maintenance of the child, the defendant could have contested her claim by denying the paternity of the child."[22]

The wife in *JD v. MD*[23] brought an action to obtain support from her husband for a child born after the divorce. The divorce had been granted in January, 1967, after the couple had been separated for eighteen months. The wife had alleged in the divorce petition and had stated at the hearing that there was one child born of the marriage. After a second child was born in August, 1967, the wife sought to obtain child support by a motion to modify. Although the wife, knowing she was pregnant, had testified at the divorce hearing that she had not "been with" her husband since their separation in June, 1965, she was allowed to introduce evidence at the support hearing in contradiction. The husband was given the opportunity to introduce evidence to rebut paternity.[24] It was held that the presumption of legitimacy still existed since the child had been conceived prior to the divorce, so the evidence of non-paternity had to be "clear and convincing," a burden the husband did not meet. Here the wife was not bound by either her petition or her testimony in the divorce hearing. The findings in this case are comparable to those in *Laumeier* and *L__A__J__* in that the husband was given an opportunity to litigate paternity albeit after the divorce had been granted.

If the husband has had an opportunity in the original action to contest paternity, the principle of res judicata usually will prevent him from defending a subsequent support action by alleging non-paternity. The only avenue open for such a husband who has concluded he is not the father of a child born during his marriage seems to be to show extrinsic fraud. This is a difficult task, since extrinsic fraud is defined to go to the power of the court to hear the action, not to go to the merits of the claim.[25]

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22. 308 Mo. at 219, 271 S.W. at 486.

23. 453 S.W.2d 661 (Spr. Mo. App. 1970). *See also* Claude T. v. Claire T., 579 S.W.2d 141 (Mo. App., E.D. 1979), where a child was born seven months after the divorce. Evidence of an adulterous relationship at the time of the child's conception and the husband's denial of marital relations were held sufficient to overcome the presumption of legitimacy. *Id.* at 142.

24. 453 S.W.2d at 664-65.

25. In Jones v. Jones, 254 S.W.2d 260, 261 (St. L. Mo. App. 1953), the court stated:

> [E]quity has jurisdiction to grant relief against a judgment upon the ground of fraud in its procurement . . . so long as the complaining party is able to show that he himself was free from fault, neglect, or inattention to the case . . . . [T]he fraud must have been extrinsic or collateral to the matters which either were or could have been presented and adjudicated in the original proceeding, and not merely intrinsic in the sense of having pertained to the merits of the cause upon which the judgment of the court was rendered. . . .[R]elief is limited to those instances where the fraud was of such a character as to have forestalled an opportunity for the fair submission of the controversy. . . .

The husband in *Martin v. Martin*[26] had been personally served and had entered an appearance in the divorce action in which his wife had alleged pregnancy. He later attempted to defend a garnishment proceeding for support payments by denying paternity. First by a motion for *coram nobis* and then by an action in equity to set aside the decree, he alleged his wife had committed a fraud upon the court by falsely asserting his paternity. The holding in both cases was that the decree could be set aside only if the fraud went to the manner in which the judgment had been obtained, not to the merits of the claim.[27]

That one court's intrinsic fraud may be another court's extrinsic fraud is evidenced in *Buford v. Buford*.[28] In that case the husband, who had been personally served and who had entered an appearance by his attorney, filed a motion within thirty days after entry to have the divorce decree set aside for fraud. Contrary to an oral agreement, the wife had testified that all four children involved were born of the marriage. The court held that extrinsic fraud had been committed upon it and set aside the decree. This type of fraud appears to be very similar to that in *Martin,* which was held to be intrinsic fraud. Perhaps the crucial difference is that the husband in *Buford* filed his motion before the judgment had become final.

A successful attack on a divorce decree may be made even after the thirty-day post-judgment period if it can be shown that, although the court actually lacked jurisdiction, a party's commission of extrinsic fraud upon it had caused jurisdiction mistakenly to be taken. In *Sigwerth v. Sigwerth,*[29] the husband filed a motion to set aside the divorce decree which had been based on constructive service. His motion alleged the falsity of statements in the wife's petition, namely, that she had been a resident of Missouri for the statutorily-required period and that she did not know the husband's address. The appellate court held the decree to be *void ab initio* for want of jurisdiction. Although there were no children, it would seem the same procedure could be followed if there were children born of the marriage. If, in a subsequent support hearing, the husband could show the court lacked jurisdiction for failure to meet residency requirements, the entire decree could be stricken as a nullity. This would apply even if the husband had been personally served. He would then be able to contest paternity when the court did have subject matter jurisdiction.

Without a showing of fraud upon the court, if paternity has been made an issue in a divorce action, the parties will be bound by the court's

26. 549 S.W.2d 542 (Mo. App., D. St. L. 1977) (motion for *coram nobis* to set aside paternity portion of divorce decree for fraud); 561 S.W.2d 396 (Mo. App., D. St. L. 1977) (action in equity to set aside decree for fraud; previous motion for *coram nobis* held to be res judicata).

27. 549 S.W.2d at 542; 561 S.W.2d at 397.

28. 433 S.W.2d 38 (K.C. Mo. App. 1968). *See also* F. v. F., 333 S.W.2d 320 (St. L. Mo. App. 1960) (action by the husband to set aside the paternity portion of the divorce decree for fraud based on the wife's allegedly false statements that the child was born of the marriage; the husband's action was not allowed).

29. 299 S.W.2d 581 (Spr. Mo. App. 1957).

determination. In *Savage v. Purcell*,[30] the wife filed a common law suit for past maintenance of her child who was born after the divorce. The husband defended by denying paternity of the child and by alleging that the divorce decree was res judicata on the issue of paternity. The husband in *Savage* had been the petitioner for divorce and had made allegations in his petition that his wife was pregnant with another man's child. The wife was personally served but had defaulted. The court held that the divorce decree, rendered on personal service, was conclusive as to all matters adjudicated as well as to all matters which could have been adjudicated, including paternity of the child.[31]

Although the parties to the divorce action, if personally served, are bound by the paternity implications or findings made in it, a third party will not be. In *L__ v. R__*,[32] the second husband brought an action against his wife's first husband to have himself declared the father of one of the children born during the wife's first marriage. The first husband asserted as a defense that the second husband was collaterally estopped by the recital in the divorce decree that the child was "born of the marriage." The court held that the second husband was not bound by the recital. This is readily explained on the basis that the second husband was not a party in the divorce action and was not in legal privity, although he obviously was in "social privity," with the wife.[33] In the divorce proceeding which was based on personal service, paternity of the children had not been an issue. There had been custody and support awards which the appellate court held to have been "incidental to the divorce decree."[34] Since the child whose paternity was being questioned was not a party to the divorce action, a finding of paternity could not be binding on him.[35] The court also held that the mother, who alleged in her petition that the child was born of the marriage, must be joined in the subsequent declaratory judgment action of her second husband against her first husband, the presumptive father, to establish the second husband as the natural father

30. 9 S.W.2d 823 (Spr. Mo. App. 1928).

31. *Id.* at 824.

32. 518 S.W.2d 113 (Mo. App., D.K.C. 1974). *See also* Annot., 78 A.L.R.3d 846 (1977).

33. 518 S.W.2d at 120.

34. *Id.* at 122, *citing with approval* A__B__ v. C__D__, 150 Ind. App. 535, 552, 277 N.E.2d 599, 616 (1971) (refers to the paternity implications of a support and custody award; the fact situation is very similar to that in *L__ v. R__*). *See also* State *ex rel.* Bentley v. Frenger, 158 Wash. 683, 291 P. 1089 (1930).

35. The holding that a child born during a marriage who is not made a party is not bound by the paternity implications of his parents' divorce decree may be important in inheritance cases. An example of this can be seen in Simpson v. Blackburn, 414 S.W.2d 795 (St. L. Mo. App. 1967). Mrs. Simpson traced her claim to the Blackburn estate through her natural father, who had legitimated her during his lifetime. The divorce decree of her mother and her presumptive father had included the usual recital of "child born of the marriage." The other heirs to the same estate attempted to defeat her claim by asserting the divorce recital as a defense. The court held the daughter was not bound by the recital since she had not been made a party to that divorce action. *Id.* at 804.

of one of the children born during her first marriage.[36] Therefore, the court apparently held that the wife also was not bound by the paternity implications of the custody and support awards even though she had filed for the divorce and had alleged the children were born of the marriage. Although *L___ v. R___* was decided before the Dissolution of Marriage Act,[37] the holding in that case should be applicable to cases arising out of that Act. The *L___A___J___* court not only cited *L___ v. R___* with approval, but also stated that it "abhors any notion that the Dissolution of Marriage Act makes all judicial pronouncements in the field of domestic relations prior to its enactment passe."[38]

Since the 1968 Missouri Supreme Court decision in *R. v. R.*,[39] a father's obligation of support extends *equally* to children born in and out of wedlock. It is clear from the reasoning and supportive authority in *L___A___J___* that if an action is brought to establish paternity of an illegitimate child, personal service must be had on the putative father to guarantee his opportunity to litigate paternity. Personal jurisdiction must be had over the defendant whether only a declaration of paternity is sought or, as is more common, an order of support is also sought.[40]

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36. 518 S.W.2d at 126. The court held that joinder of the mother and the child was mandated under Mo. Sup. Ct. R. 52.04, which provides:

> A person shall be joined if . . . in his absence complete relief cannot be accorded among those already parties, or . . . is so situated that the disposition of the action in his absence may . . . leave any of the persons already parties subject to a substantial risk of incurring . . . inconsistent obligations by reason of his claimed interest.

Whether the child should be represented by his mother as next friend, which is the usual case, must be determined. If the mother's sole interest in the action is the support liability, she may not be the appropriate person to represent the child's interest.

37. RSMo ch. 452 (1978) became effective January 1, 1974.

38. 577 S.W.2d at 154.

39. 431 S.W.2d 152, 154 (Mo. 1968). The Missouri Supreme Court held that the United States Supreme Court's decisions in Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), compelled its holding that the Missouri statutes relating to the rights and obligations of parents gave illegitimate children rights equal to those of legitimate children to require support from their fathers. *See also* Krause, *supra* note 7.

40. State *ex rel.* Anonymous v. Murphy, 354 S.W.2d 42, 43 (K.C. Mo. App. 1962). A declaratory judgment action brought by two minor children against their putative father to determine their parentage was dismissed for failure to obtain personal jurisdiction over the defendant. Although this action had been brought only to determine the legal relationship, the court reasoned that such a determination would result in the defendant's personal liability for the children's support. *Id.* at 44. In Howells v. McKibben, 281 N.W.2d 154 (Minn. 1979), the court allowed the use of the Minnesota long-arm statute to obtain personal jurisdiction over the putative father on the basis of tort liability. Although the child was alleged to have been conceived in Wisconsin, it was held that the defendant, through numerous phone calls to and visits within Minnesota, and the fact the child was born in Minnesota, had sufficient minimum contacts with Minnesota such that a court of that state could take jurisdiction.

The court in *Murphy* also held that the declaratory judgment action is appropriate for determining parentage. It is authorized by the Declaratory Judgment Act, RSMo § 527.010 (1978), which provides: "The circuit courts of this state,